

The Order now on appeal is from the second of two preliminary hearings held in this case. At the first hearing, January 13, 1999, claimant presented testimony relating to the onset of heel and arch pain in his right foot. Claimant did not present medical testimony linking the foot problems with his work activities, and the Administrative Law Judge denied claimant's request for benefits.

In the second hearing, held March 31, 1999, claimant presented the report of Dr. Edward J. Prostic which does relate the symptoms to claimant's work activities as follows:

During the course of his employment, Laverne "Bud" Stewart has sustained repeated minor trauma to his lower extremities, predominantly from standing, walking, and twisting on concrete. He currently has evidence of peroneal tendinitis about the right leg.

After the second preliminary hearing, the Administrative Law Judge again issued an Order denying the requested preliminary benefits. Claimant now appeals from that second Order.

The record in this case indicates claimant worked for respondent as a finish grinder preparing large truck cabs for painting. After working six or seven months, he started noticing pain in his arches and heels. He was hired in July 1997 and began noticing the pain at the end of 1997. The symptoms gradually worsened as claimant continued to work. On September 29, 1998, the symptoms increased after claimant stepped on the end of a cord and rolled his foot.

Respondent referred claimant to a chiropractor, Dr. Daron Stegall. Dr. Stegall first saw claimant October 9, 1998, for the chief complaint of pain in the arch of the right foot. Claimant returned to Dr. Stegall on November 30, 1998, again with complaints of right arch and heel pain. Dr. Stegall's letter of January 8, 1999, indicates claimant presented differently on this second occasion. This time he had moderate ankle swelling and reported that he woke with the pain and swelling on November 26, 1998. Claimant has testified that his work was substantially heavier during the week before Thanksgiving.

Claimant went on his own to see Dr. Sheryll D. Elder. Dr. Elder first saw claimant December 3, 1998, and Dr. Elder's records report a history of right arch pain since July 1998. Dr. Elder ruled out several potential nonwork causes including thyroid and vitamin deficiency. But Dr. Elder also indicated that she could not state that the condition was work related.

After the first preliminary hearing, claimant's counsel sent claimant for an evaluation by Dr. Prostic. Dr. Prostic reported, as above quoted, that the claimant suffers from peroneal tendinitis which is caused by repeated minor trauma from standing, walking, and twisting on concrete during the course of his employment. Dr. Elder likewise diagnosed tendinitis of right foot and ankle.

Claimant contends that the record in this case contains uncontroverted evidence that claimant's condition is work related. Although this evidence may, in some sense, be uncontroverted, there is reason to doubt the validity of Dr. Prostic's opinion. The record shows that after the initial release by Dr. Stegall, claimant played touch football and danced.

Dr. Elder's report of March 22, 1999, stated that she is not sure whether work, playing football, or dancing caused the medical condition, i.e., the swelling, that claimant awoke with on Thanksgiving. Dr. Prostic's report, on the other hand, does not mention the football or dancing, suggesting he may not have been aware of either.

Nevertheless, the Board finds the evidence establishes more probably than not the work has caused injury to claimant's right foot. The reason for the swelling on Thanksgiving remains without a full explanation in the record, but claimant denies any injury while playing football or dancing. The dancing was several weeks before Thanksgiving, and the football playing was approximately a week before Thanksgiving. Based on the timing and claimant's testimony that he did not injure his foot doing either, the Board finds Dr. Prostic's report to be convincing. The Board concludes from the evidence presented that claimant's foot injury was caused by the repetitive activities described in Dr. Prostic's report. The Board finds claimant has proven accidental injury arising out of and in the course of employment.

An additional issue has been raised by the insurance carriers concerning the date of accident. Zurich American Insurance Company had coverage through September 30, 1998, and Travelers Insurance Company provided coverage thereafter. But, the issues relating to the date of accident and coverage are not jurisdictional issues. For that reason they are not subject to review or decision by the Board on appeal from a preliminary hearing order. K.S.A. 44-551.

Having found that this injury did arise out of and in the course of claimant's employment, the Board must remand this claim to the Administrative Law Judge to determine whether, and during what period, claimant was temporarily totally disabled and for decision on whether claimant needs further medical treatment and, if so, which physician should be authorized to provide that treatment.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Bryce D. Benedict on April 1, 1999, should be, and the same is hereby, reversed. This claim is remanded to the Administrative Law Judge for further decision on temporary total disability and medical benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1999.

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BOARD MEMBER

c: Ami S. Hyten, Topeka, KS  
Wade A. Dorothy, Lenexa, KS  
John F. Carpinelli, Topeka, KS

Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director